BRIEF IN SUPPORT OF FOREGOING PETITION

STATEMENT OF THE CASE

Reference is made to the foregoing petition for a summary statement of the case, the citation of the opinions below and the statement as to jurisdiction.

SPECIFICATIONS OF ERROR

1. The court below erred in affirming and not reversing the judgment of the District Court wherein petitioner's complaint was dismissed (280).

2. The lower courts erred in finding that the unrepaid advances from the Bank were not made at Metropolitan's suggestion and on Metropolitan's instructions.

3. The lower courts erred in finding that the advances were intended by the Bank as payments on behalf of the mortgagors who did not even know that they had been made.

4. The lower courts erred in holding that the Bank was a volunteer in making the advances, whereas in fact the Bank was obligated under its express agreement with Metropolitan to make them.

5. The lower courts erred in holding that the advances were not made for Metropolitan's benefit by the Bank as its agent, and that the Superintendent of Banks could not recover them back for its depositors and creditors.

SUMMARY OF ARGUMENT

I.

The Controlling Findings and Conclusions of the Lower Courts Are Clearly Erroneous.

II.

The Bank Having Made the Advances Pursuant to the Terms of Its Agency Agreement and Within the Scope and in Performance of Its Agency, and the Advantages Thereof Having Inured to the Benefit of Its Principal, the Statutory Liquidator of the Bank Is Entitled to Reimbursement from Metropolitan for the Resultant Loss to the Bank.

III.

If the Advances Are Construed as Payments, They Were Illegally Made, and Are Recoverable by the Statutory Liquidator of the Defunct Bank.

ARGUMENT

I.

The Controlling Findings and Conclusions of the Lower Courts Are Clearly Erroneous

We recognize the force and effect of Rule 52 of the Federal Rules of Civil Procedure and also the rule of this court as stated in *Virginian Ry. vs. Federation,* 300 U. S. 515, 542, to the effect that findings of fact are controlling, unless plainly erroneous or unsupported by evidence.

It is our claim that the controlling findings of fact of the trial court, which were adopted without opinion by the

Circuit Court, are unsupported by any evidence and are clearly erroneous.

From the facts as we have stated them in the foregoing petition and as they are embodied in the written stipulation of the parties, it will be seen that prior to July 1, 1926, the Bank was merely required to forward to Metropolitan monthly the amounts which it had actually collected on the mortgages. To that date, Metropolitan had neither requested nor required the Bank to advance to it uncollected principal or interest payments on the due dates. The Bank theretofore had made advances in a few rare instances (not material here). It had made these advances as shown by its letter of January 21, 1926 (93) upon its own initiative and not in response to Metropolitan's instructions.

On July 1, 1926, however, Metropolitan indicated its desire that the Bank advance all payments to it on the due dates, whether the Bank had actually made collection of such payments or not. In its letter of that date (98), Metropolitan stated specifically

> "We prefer that you advance the payments to us **when due.** This method will simplify matters greatly for us here."

When it wrote to the Bank on July 14, 1926, Metropolitan was even more insistent (99), and said

> "**We are required to receive here, all interest and principal payments on the due date.** On this point we have no choice in the matter and furthermore we would be subject to serious criticism by the Insurance Department of the State of New York. Not only that, but the loss of interest to us on so large a sum would amount to considerable in the aggregate during the year."

In this last letter it was suggested that someone in authority connected with the Bank come to New York to discuss the matter with Metropolitan's cashier. Such a trip

was made and on July 29, 1926, the Bank wired Metropolitan (101) as follows:

> "Our executive committee has accepted **your suggestion** that **we make weekly remittance of principal and interest installments as the same become due** with the understanding that **you will not credit such remittances** on the notes **except upon our written advice that the said items have actually been paid by the mortgagors.**"

On July 31, 1926, the Bank summarized the existing agreement by letter to Metropolitan (102), as follows:

> "4. Remittances of interest and principal installments will be mailed by us on Saturday of each week, covering amounts **maturing** during the weekly period beginning with the preceding Saturday and ending with the preceding Friday. In the event that any Saturday shall fall on a bank holiday, then the weekly remittance to be mailed on such day shall be forwarded on the next succeeding business day.
>
> "10. Remittances by us of any principal and interest installments **will not be construed as evidence that the mortgagor has paid the same** and such remittance of principal and interest **will not be credited by you on the mortgage notes except upon written advice that such installments have actually been paid by the mortgagor.**"

Metropolitan on September 2, 1926 (227) took exception to the fact that the Bank had not remitted for certain items which were due in July and August. In this letter Metropolitan stated:

> "We also enclose a statement showing the items due in July and August for which we have received no remittance, although most of the items were due several weeks ago. **The understanding was that you would remit to us weekly for all items due, whether the same had been collected or not.** This you have failed to do.
>
> "In order to avoid further confusion in regard to the matter, we will hereafter send you, monthly, in advance of the due date, a statement of all items due

> according to our records during the following month. Your remittance **must** correspond with the amount shown due on the statement sent you and be accompanied by an explanation if there should be a payment made in excess of the amount due quarterly. A statement of the items due during the current month will be sent you in a few days."

Thereafter, as outlined in the above letter, Metropolitan sent monthly written statements to the Bank (107) on forms identical with Exhibit 1 (134). These statements listed all of the payments due during the month following. The Bank thereupon, using forms of which Exhibit 2 (159) is a sample, remitted weekly to Metropolitan the amounts due during the prior week, whether or not it had collected the same from the mortgagors. A reference to these two exhibits will disclose that the remittances by the Bank corresponded in amount **(as Metropolitan insisted they must)** with the billings of Metropolitan (258).

In the face of this irrefutable documentary proof the trial judge in his opinion says (261):

> "There is nothing in the record to support a contention that Metropolitan Insurance Company ever instructed the Bank to make advancements."

This erroneous conclusion is embodied into paragraph 17 of the findings of facts (276). The trial judge also found that the advancements made by the Bank were intended by it to constitute payments to Metropolitan on behalf of the mortgagors (262, 276). This finding is clearly contrary to the undisputed written evidence, and is diametrically opposed to the further finding of the trial court (254, 276), supported by all of the evidence, that the mortgagors were purposely kept in complete ignorance of the fact that the Bank was remitting to Metropolitan installments of principal and interest on the due dates, which the mortgagors had failed to pay to the Bank.

In arriving at these clearly erroneous bases for its judgment, the trial judge entirely overlooked the significant stipulated fact that all advancements by the Bank to Metropolitan were made (101)

> "with the understanding that you will not credit such remittances on the notes except upon our written advice that the said items have actually been paid by the mortgagors."

and the further understanding that (104)

> "Remittance by us of any principal and interest installments **will not be construed as evidence that the mortgagor has paid the same** and such remittance of principal and interest will not be credited by you on the mortgage notes except upon written advice from us that such installments have actually been paid by the mortgagor."

and the further mutual understanding (113)

> "that remittances by us are **not to be regarded as actual payment by the mortgage obligors**, and that such remittances are not to be endorsed upon the notes except upon our written advice, and that this mutual understanding covers all loans now purchased or to be purchased in the future."

We have already demonstrated the fallacy of the statements in the opinion and findings (261, 264, 265, 266, 276), of which the following is typical (265):

> "A close examination of the whole record and especially of the correspondence that passed between these parties convinces me, first, that these advances were not made upon the instruction of Metropolitan to the Bank, and second, that these advances were made by the Bank to Metropolitan as payments upon the mortgage obligations."

The trial court suggests that the Bank instead of making an advance had the right to request Metropolitan (275) "to waive one or more installment payments if it chose to do so." But the right to request another to waive the

performance of a contractual obligation, which such other can refuse, is not a true right at all.

The trial judge was clearly in error in another vital, if not controlling, particular. In paragraph 22 of the Findings of Fact (278) he found:

> "22. That the Bank had its option to repurchase mortgage loans that it had sold Metropolitan on which there had been a default in the payment of installments either of principal or of interest."

Again in paragraph 13 of the Findings of Fact (275) he found that:

> "b. It had the option to repurchase said mortgage or to exchange another mortgage for the one upon which the mortgagor was unable to meet his obligation."

The truth of the matter is that the Bank had no option to repurchase a defaulted mortgage or to exchange another mortgage for one in default.

The contract between Metropolitan and the Bank which is embodied in the stipulation explicitly defines the rights of the parties thereto as follows (91):

> "Sixth. If any of said mortgages are not paid in full, as to principal and interest, when due, or in case of any other default in the conditions thereof, the **Party of the First Part (the Bank) requests the privilege of repurchasing same** and to pay therefor the amount of the principal then unpaid together with all accrued and unpaid interest and any other costs or expenses properly chargeable thereto, or, **at its sole option the Party of the Second Part (Metropolitan)** may accept in exchange for a duly executed assignment of any of said mortgages, an assignment from the Party of the First Part of other mortgages of like amount, which shall be satisfactory to and meet with the approval of the Party of the Second Part." (Insertions in parantheses ours.)

It will be seen from an examination of the foregoing paragraph of the contract that the Bank merely requested therein the privilege to repurchase defaulted mortgages, and that the only option involved was Metropolitan's sole option, if it granted the Bank's request, to accept another good mortgage in exchange for the defaulted one.

This glaring error on the part of the District Court is significant because if the Bank actually had an option to repurchase defaulted mortgages, which it certainly did not, then assuming that the security behind a defaulted mortgage was adequate it could recapture its advances by buying back the mortgage and enforcing the security. Without the right, however, to repurchase, the Bank had no chance to make itself whole unless, as we claim herein, Metropolitan is legally obligated to reimburse it for the unpaid advances.

A reading of the opinion will show that these findings are the very heart of the decision of the lower court, and that they form the vital premises upon which its erroneous judgment is founded. They likewise, by adoption, form the bases for affirmance by the Circuit Court.

The determinative conclusion of law of the trial judge (and of the Appellate Court) (278) is as follows:

> "1. That where an agent makes voluntary advancements to its principal for the benefit of a third person, the agent is not entitled to reimbursement from his principal; and if he makes remittances to his principal for his own benefit and becomes a volunteer there can be no recovery."

This conclusion is obviously erroneous because under the servicing agreement as amended by the correspondence, the Bank was required to make advances and, therefore, was not a volunteer. Metropolitan was benefited by the advancements. The Bank was not because an overdrawn condition of its accounts was thus created (109). Metro-

politan was enriched at the expense of the depositors and creditors of the Bank.

II.

The Bank Having Made the Advances Pursuant to the Terms of Its Agency Agreement and Within the Scope and in Performance of Its Agency, and the Advantages Thereof Having Inured to the Benefit of Its Principal, the Statutory Liquidator of the Bank Is Entitled to Reimbursement from Metropolitan for the Resultant Loss to the Bank.

We have shown most conclusively that the remittances made by the Bank were forwarded to Metropolitan upon an express understanding that they were not to be credited by Metropolitan upon the mortgages and were not to be treated as payments.

The remittances by the Bank were made in response to the billings of Metropolitan and under the express terms of the agreement which, of course, bound both parties. In the performance of its agency, the making of these advances by the Bank was one of its duties, and Metropolitan as principal was thereby benefited in that it received the moneys in advance of their collection from its mortgagors and was able to invest the same and to profit by such investment.

The only benefit resulting to the Bank from such advances, if any benefit there was, lay in the fact that it was complying with the obligations of its contract with Metropolitan. It was not ingratiating itself with the mortgagors because the mortgagors were unaware that the Bank was making advances.

The Bank thus, as agent, made remittances to the principal for the principal's benefit, and under rules long

established would, upon the termination of its agency, have been entitled to reimbursement for its resulting loss.

Here, the agency contract was terminated by operation of law when the Bank was forced to close its doors and its assets were taken over for liquidation by the State Liquidator.

The termination of the agency thus resulting fixed the liability of Metropolitan and fixed the right of the liquidator to recover the unrepaid advances in behalf of his trust.

This court succinctly stated this principle of law in the case of *Bibb vs. Allen*, 149 U. S. 499, as follows:

> "It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it. So that the employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but likewise implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary, or may result from the performance of his agency."

This fundamental rule is the law of the State of Ohio, as is shown by the following excerpt from *1 Ohio Jurisprudence*, Sec. 97, page 793:

> "And as a general rule **the law will imply a promise of indemnity by the principal for necessary expenses advanced or incurred by the agent, in order to consummate what he is directed to do.**"

See also:

Riggs vs. Lindsay, 11 U. S. 500, 7 Cranch. 315;
Avery Co. vs. Herriott-Carithers Co., (Ind. App.), 143 N. E. 304;

Mandell vs. Moses, 205 N. Y. S. 254, 257;
Fargason Co. vs. Pitts (Mo.), 281 S. W. 148, 150;
Boles Livestock Commission Co. vs. Midland National Bank (Mont.), 23 Pac. (2d) 967;
Carwile vs. Metropolitan Life Insurance Co. (S. C.), 134 S. E. 275, 285;
Owen vs. Baxters Estate (Mich.), 56 N. W. 930;
Denny vs. Schoonover (Ind. App.), 153 N. E. 779;
Admiral Oriental Line vs. U. S. (C. C. A. 2), 86 F. 2d 201;
2 Am. Jur. 231, Sec. 294; 21 R. C. L. 834, Sec. 17; 3 C. J. S. 101, Sec. 197;
Mechem on Agency, 2nd Ed. Vol. 1, 1199, Sec. 1601.

The foregoing authorities decisively demonstrate the proposition of law here applicable.

The Bank, as agent, has made remittances to the principal for the principal's benefit. These advances were not only made within the scope of its agency, but in addition Metropolitan requested and instructed the Bank to make them.

Under these circumstances, there can be no question but that Metropolitan upon the termination of the agency, is obligated to reimburse the Superintendent of Banks for the resulting deficiency.

Plaintiff, upon the undisputed facts in the case at bar, is entitled to recovery as a matter of law.

The case of *Coffey vs. Lawman*, 99 F. 2d 245, cited by the District Court in its opinion as standing for the theory that an agent is not entitled to reimbursement from his

principal for advances made in the performance of the agency is far afield and utterly inapplicable to the factual situation here.

In that case, a Bank as **trustee** had set up a mortgage pool and had issued and sold trust participation certificates to individuals. The Bank shifted good mortgages out of the pool and substituted therefor bad ones and was otherwise guilty of sharp practices in its handling of the trust. In order to cover up its illegal practices, it paid interest to holders of the trust certificates which the trust did not earn. The certificate holders were in ignorance of the fact that the shuffled assets of the pool had not earned the interest. Upon the appointment of a federal receiver for the Bank, it was held that he was not entitled to recover these payments of interest from the holders of the participation certificates.

The case of *Re*: *Media-69th Street Trust Co.,* 115 A. L. R. 869 (Pa.), relied upon by respondent below is the same type of case as the *Coffey* case.

The only other case upon which respondent placed reliance was that of *Wilson vs. Crosby,* 67 N. W. 693 (Mich.), where an agent collecting rents for a landlord took a note payable to himself from a tenant covering a rental payment and paid the rental money to the landlord. He then endorsed the tenant's note, and negotiated it at a Bank. He thus made the tenant his debtor instead of the debtor of his principal, and it was held that he was not entitled to reimbursement from his principal. In the *Wilson* case, it is recognized that advances made by an agent to his principal at the suggestion of the principal and without the knowledge of the debtor are recoverable, and in fact this question was left to the jury even where the agent took and discounted a note payable to himself from the tenant.

It was contended below that the advances made by the

Bank to Metropolitan constituted loans to the mortgagors. But that these advances were not loans to the mortgagors is plain. A loan implies that there is a borrower and a lender. There was no borrower here other than Metropolitan, and the only loan was an advance from the Bank as agent for Metropolitan's convenience and benefit, so that Metropolitan would not be criticized by the Insurance Department of the State of New York, and so that Metropolitan could secure a return of interest and thereby profit by the investment of these advances.

If the Bank had consulted the mortgagors and at their request had made payments to Metropolitan in their behalf, and the Bank had treated such advances as loans to the mortgagors, evidenced by their promissory notes, we would have a far different situation than that presented in the present record.

It was never intended by either Metropolitan or the Bank that the mortgagors would benefit by the advances. The mortgagors knew nothing about them whatsoever.

Metropolitan sought at the trial to make something of the fact that the mortgagors paid interest at six per cent upon the actual balances remaining due upon their mortgage notes, and that the Bank benefited by these collections of interest where the amounts advanced were, with interest, repaid. It was claimed that by receiving this interest, the Bank in effect was treating the advancements as obligations of the mortgagors and not of Metropolitan. This, of course, does not and cannot follow.

The mortgagors were required, under their notes and mortgages, which Metropolitan owned, to pay interest at six per cent upon their unpaid balances (60). The Bank, as collection agent, was entitled to retain all interest collected (59) in excess of five and one-half per cent net to Metropolitan. The Bank, therefore, was doing nothing

more than its contract with Metropolitan authorized and required it to do. The Bank was merely collecting interest on the mortgages in accordance with their terms. The method followed by the Bank in this regard is clearly shown in Exhibits 5-A, 5-B and 5-C (212, 213).

We respectfully submit that fundamental legal principles entitle plaintiff to recovery. All of the advances here made were remitted by the Bank as agent in compliance with its contract. The principal benefited thereby. The advances were within the scope of the agency relationship. The agent Bank was clearly entitled to reimbursement and plaintiff as Superintendent of Banks is entitled to judgment as a matter of law.

III.

If the Advances Are Construed as Payments, They Were Illegally Made and Are Recoverable by the Statutory Liquidator of the Defunct Bank.

If the remittances were made, as Metropolitan claims, not as conditional advances or not as advances made by an agent for its principal's benefit, but as actual and unconditional payments to Metropolitan of the obligations of its mortgagors, then the doctrine of *ultra vires* has full and complete application to this case.

It will be remembered that under the agency contract, it was expressly provided that the mortgages were not guaranteed by the Bank and also that all of the mortgage notes and mortgages were endorsed and assigned by the Bank without recourse.

It was recognized by the courts below that the mortgagors did not request the Bank to make the advances in their behalf, and that in fact both Metropolitan and the

Bank kept the mortgagors in ignorance of the fact that advances were made by the Bank.

In paragraph 18 of the Findings of Fact, 276, the trial judge found:

> "That the reason that impelled the Bank to request Metropolitan not to credit upon the mortgage notes any advances made by the Bank was that the Bank did not desire to become embarrassed **by having the mortgagor know** that his note in the hands of Metropolitan had received a credit for a payment by the Bank in his behalf, and further the Bank did not desire to be compromised or embarrassed in any way **if it chose to repurchase the mortgage** and begin foreclosure proceedings."

We have already shown that the Bank had no choice or option to repurchase defaulted mortgages. The lower courts were clearly in error in so concluding, and that error forms a major premise upon which the erroneous judgment is based.

If the Bank had the right to repurchase any mortgage upon which it had made advances, then, knowing the security behind such mortgage, it was in position to repurchase it and thus recover back what it had advanced. But it had no such right, and, therefore, was powerless to recover the advances.

Inasmuch as the mortgagors were in ignorance that advances had been made upon their mortgages, the Bank as to them was a pure volunteer and intermeddler and had no right of recovery against them. They did not request that the advances be made; they did not know that the advances were made; and the Bank, so far as they were concerned, had no obligation whatsoever to make them.

Either, as we claim under the preceding section of the argument herein, these advances were conditional advances made by an agent to its principal and recoverable as such or, if treated as payments, they were *ultra vires* gifts or

transfers of the Bank's funds and are recoverable by the Superintendent of Banks.

By making **payments** (as distinguished from conditional advances) to Metropolitan, the Bank was doing a thing which it had no obligation to do under its contract, and no right to do under the law.

Section 710-47 of the Ohio General Code, which was in effect during the period involved in this litigation, empowered a Bank organized under the laws of Ohio

> "To do **all needful acts,** to carry into effect the objects for which it was created."

Of course, this empowering legislation does not permit the Bank to needlessly do something which under its contract it had no obligation to do and which in effect amounted to a giving away or unlawful transfer by the Bank of the moneys entrusted to it by its depositors.

Inasmuch as the Bank did not guarantee the mortgages which it sold to Metropolitan, it had no implied power to make gift payments thereon in advance of collection (unless its remittances to its principal entitled it **as agent** to reimbursement).

If the Bank had given Metropolitan $400,000.00 in an expansive moment just because Metropolitan favored the Bank with its business, such misapplication of the Bank's funds would entitle the Superintendent of Banks to a recovery of the gift.

That the Bank had no implied power to give its money away is elementary.

It is just as clear that the Superintendent of Banks is entitled to recover the advances if, as the lower courts held, the Bank was a volunteer in advancing moneys to Metropolitan and intended that the same should be considered as payments on the mortgages.

The Bank had no interest in the mortgages except as collection agent. And it is immaterial that the Bank sold the mortgages to Metropolitan. Metropolitan is the sole owner thereof, the same as if it had acquired the mortgages from some other source.

The general proposition of law that a liquidator of a bank is entitled to recover back assets which the bank unlawfully transferred is stated in *9 C. J. S.* Sec. 431B, page 857, as follows:

> "Bank commissioners in charge of the liquidation of a closed bank may recover assets **unlawfully transferred** or pledged by the bank without first restoring the consideration received."

Where as here the Bank received no consideration from Metropolitan for the advances, this general rule should have more ready application.

In the case of *Texas & Pacific Railway Co. vs. Pottorff, Receiver*, 291 U. S. 245, this court held that the pledge of bonds by a national bank to secure the repayment of a deposit with the bank was *ultra vires*, and that the pledged bonds were recoverable by the receiver. The following excerpt is taken from the opinion at page 260:

> "The receiver is not estopped to deny the validity of the pledge. The railway's argument is that the bank could not set up the defense of **ultra vires** since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. **Neither branch of the argument is well founded.** The bank itself could have set aside this transaction. It is the settled doctrine of this court that no rights arise on an **ultra vires** contract, **even though the contract has been performed**; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. (Citing cases.) **But even if the bank would have been estopped from asserting lack of power, its receiver would be free to**

challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. **It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so.''**

While in the case at bar the Bank involved was not a national bank, but a bank organized under the laws of the State of Ohio, the same rule applied by this court in the *Pottorff* case is likewise applicable in Ohio.

In the case of *Norwood Sash & Door Mfg. Co. vs Logsdon,* 65 O. App. 254, the Court of Appeals for Hamilton County said at page 256:

> ''The appellant, William M. Logsdon, was, under the agreement, to act as the contracting builder. He is presumed to know the limitations placed upon banks by law.
>
> ''No statutory authority can be found justifying the engagements charged to the bank, which is a creature of statute. The principles and laws applicable to corporations being general in character do not control banks which are created and controlled by legislation directly limited to their creation and operation. *Ulmer vs. Fulton, Supt. of Banks,* 129 Ohio St. 323, 195 N. E. 557.''

In the case of *Ulmer vs. Fulton, Superintendent,* 129 O. S. 323, the Supreme Court of Ohio held:

> ''Banks and trust companies have only such powers as are expressly conferred on them by their charter and by statute, or such as may fairly be implied from those expressly given.''

At page 342 of the opinion the Supreme Court with respect to the *Pottorff* case said:

> ''The Supreme Court of the United States has recently spoken on the subject in the case of *Texas & Pacific Ry. Co. vs. Pottorff, Recr.,* 291 U. S. 245, 78

L. Ed. 777, 54 S. Ct. 416, in which the effect of its holding is that national banks have no powers except those conferred by Congress. **Hence, even where such a bank fully performs a contract unauthorized by law, it is a nullity** and estoppel cannot be interposed to circumvent its invalidity. **The principle of this case,** at least, **is applicable to the present situation.**"

The recent case note entitled "Ultra Vires Acts of Banking Corporations," found in 17 Ohio Opinions 136, contains an up-to-date collection of the Ohio cases dealing with this subject, and fully supports our position.

If, therefore, the Bank's advances to Metropolitan were conditional, or were the advances of an agent to its principal, or were advances made under an express understanding that they would not be considered as payments, they are recoverable without benefit of any claim of *ultra vires.*

If, however, they were voluntary gifts, or if they were actual payments made by the Bank as a volunteer, then they were *ultra vires* and are recoverable by the Superintendent of Banks as misapplications and unlawful transfers of the assets of the Bank which belong to its depositors and creditors.

CONCLUSION

We have demonstrated herein beyond peradventure that the controlling Findings of Fact of the District Court, which without opinion were adopted by the Circuit Court, are diametrically contrary to the facts which were stipulated by the parties to be true. Upon these erroneous findings which were wholly unsupported by any evidence the erroneous judgments of the lower courts were based, and we respectfully submit that this case is one which requires

the exercise of this court's supervisory power to correct the wrong which has been perpetrated by those judgments.

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